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In the Supreme Court of the United States

OCTOBER TERM, 1976

CHRISTOS L. NETELKOS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

CHARLES H. GAMAREKIAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the hypothecation by petitioners, who were securities dealers, of securities held in trust for their customers, without the knowledge or consent of the customers, and the commingling of such securities with securities not owned by customers, constituted a violation of 15 U.S.C. 78h(c).

2. Whether the sale by petitioners of securities held in trust for their customers, without the knowledge or consent of the customers, constituted a fraudulent scheme in violation of 15 U.S.C. 78j(b).

3. Whether the evidence was sufficient to show the existence of a single conspiracy to violate the federal securities laws.

4. Whether the trial court's instructions on the conspiracy count constituted plain error.

5. Whether the trial court's failure to marshal the evidence in greater detail warrants reversal.

6. Whether the district court should have declared a mistrial when it excused a juror.

7. Whether certain evidentiary rulings were error.

8. Whether the sentence imposed on petitioner Netelkos was improper.

9. Whether petitioner Netelkos' examination of witnesses deprived other petitioners of their right to confrontation.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiracy to violate the federal securities laws, in violation of 18 U.S.C. 371. Petitioners Netelkos, Gamarekian, and Rega were also convicted on 33 substantive counts that included hypothecation of customer securities in violation of 15 U.S.C. 78h(c), 78ff(a) and 17 C.F.R. 240.8c-1, unauthorized sales of customer-owned securities and conversion of the proceeds thereof, in violation of 15 U.S.C. 78j(b), 78ff(a) and 17 C.F.R. 240.10b-5, the making and keeping of false records, in violation of 15

U.S.C. 78q(a), 78ff(a) and 17 C.F.R. 240.17a-3, filing false material statements with the Securities and Exchange Commission (hereinafter "SEC"), in violation of 18 U.S.C. 1001, and filing a false financial report with SEC, in violation of 15 U.S.C. 78q(a), 78ff(a) and 17 C.F.R. 240.17a-5. Netelkos was sentenced to a total of 11 years' imprisonment and a fine of $50,000.[1] Gamarekian and Rega each were sentenced to concurrent five-year prison terms and fines of $10,000. Ysrael and Santoriello each were sentenced to 18 months' imprisonment. The court of appeals affirmed without opinion (Pet. App. A).

Petitioners were principals and employees of a brokerage firm known as Christian-Paine, Inc., which had been formed in December 1972 as a successor to Carlton Cambridge, Inc.[2] Christian-Paine engaged in a practice (carried over from Carlton Cambridge) known as "shorting," by which stock which had been ordered and paid for

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[1]Netelkos was sentenced to concurrent prison terms of two years each and a $10,000 fine on counts 2-8; concurrent prison terms of two years each and a $10,000 fine on counts 9-13, to run consecutively to the sentence imposed on counts 2-8; concurrent prison terms of two years each and a $10,000 fine on counts 14-28, to run consecutively to the sentences imposed on counts 2-8 and 9-13; concurrent prison terms of three years each and a $10,000 fine on counts 29-33, to run consecutively to the sentences imposed on counts 2-8, 9-13, and 14-28; two years' imprisonment and a $10,000 fine on count 34, to run consecutively to the sentences imposed on counts 2-33; and five years' imprisonment on count 1, to run concurrently with all of the above sentences.

[2]Carlton Cambridge had been managed by the same individuals who managed the successor firm, including petitioners Netelkos, Gamarekian, and Santoriello. All employees of the former company were retained by the latter. The books and bank signature cards of Carlton Cambridge were carried forward without change (Tr. 1262, 1628, 2052).

by the firm's customers was reflected on the customer's account but had not in fact been purchased (Tr. 1583-1585, 2464-2466). Petitioners engaged in "shorting" in the expectation that the market price of the securities in question would fall, enabling them to purchase the stocks later at a better price and retain the difference in price.

Petitioners engaged in this practice for several months, but the market did not fall as anticipated, and the firm's stock shortages eventually became critical. When customers began calling the firm to demand securities for which they had paid but which Christian-Paine (having never bought the securities) was unable to produce upon request, the firm began to purchase stock to cover the shorted customers, giving priority to those customers whose demands were most insistent (Tr. 1755, 2847, 3093). However, the firm was unable to short enough new purchases to provide the funds necessary to cover demands for the formerly shorted purchases (Tr. 2879-2880).

In August 1973, therefore, Christian-Paine began large scale sellouts of customer securities to cover its mounting losses. On instructions of petitioners Gamarekian, Netelkos, and Rega, more than $600,000 worth of customer-owned securities were sold without the knowledge or consent of the firm's customers. The records of the sales were maintained in a "special blotter" which was concealed from auditors of the SEC and the National Association of Securities Dealers (NASD) (Tr. 1757-1774, 2679, 2868, 3746-3768). In addition, the firm began to pledge customer securities, similarly without customer consent, as collateral for outstanding loans to Christian-Paine, a process known as "hypothecation." An audit of Christian-Paine's bank statement by SEC investigators in January, 1974, revealed

that petitioners had commingled customer-owned and firm-owned securities in pledging both as collateral for a loan at the American Bank and Trust Company (Tr. 4609-4610, 4624, 4676). When the owners of the hypothecated securities requested them, petitioner Santoriello and Netelkos resorted to a variety of excuses for the firm's inability to produce them (Tr. 1641, 4073.).

Petitioners' scheme required maintainance of duplicate sets of books and records as well as other measures designed to prevent discovery by representatives of the regulatory bodies. At Gamarekian's direction, petitioner Ysrael set up a "short book" reflecting the firm's true financial situation, which was kept hidden from the investigators. A second set of records, falsely made and maintained in order to present a healthy financial picture, was kept available for inspection, and was continuously changed to mislead the regulatory agencies and the public (Tr. 2637). Petitioners worked numerous nights and weekends altering the books and records that the regulatory bodies were to examine (Tr. 1646, 1795, 2854-2855, 2944, 3246, 3298). In the process, petitioner Ysrael acquired the reputation in the firm of "the fastest eraser in the East" (Tr. 1705, 1788).

Petitioner Ysrael was also responsible for reconciling bank statements with the firm's dual record system, and for preparing the general ledger. From the ledger the trial balance was prepared, then reviewed by Netelkos, who from time to time made changes in loan balances and in clearing and trading account figures in order to present a healthier appearance than was warranted. Together with Gamarekian and Rega, Netelkos inflated the firm's net

capital ratio in order to mask its growing deficit (Tr. 1578, 1641-1657, 1719-1720, 4645-4659). The doctored financial statements then were submitted to NASD (Tr. 1663-1665).[5]

Early in 1974 Christian-Paine was purchased by Consolidated Capital Company, a public holding company, but petitioners continued to dominate the enterprise (Tr. 4262-4263, 4283-4284, 4399-4402). Soon, Consolidated's customers were unable to obtain securities for which they had paid. Norman Sterner, a Consolidated executive, went to Christian-Paine's offices in April and found that the firm had closed its doors. Pressed for information, petitioner Rega threatened Sterner, telling him that if he went to the

[3]Petitioners took other actions to thwart close inspection by the regulatory agencies. When in early 1973 NASD auditors uncovered certain accounting improprieties, they ordered a certified audit. Netelkos arranged for the audit to be conducted by his personal accountant, who had had no prior experience in such matters, and whose report turned up no significant errors (Tr. 370-372, 400-406, 765-767). A subsequent spot check by an NASD representative revealed numerous erasures on the firm's customer schedules. The representative was able to make out 39 erased customer account numbers, and he requested the cards relating to such accounts. After examining 15 of them he found credit balances totalling $37,000 that should have appeared on the customer schedules, but did not. When the representative continued his review four days later, all the erased lines had been obliterated, preventing further investigation (Tr. 1209, 1212-1214, 2397). On another occasion, NASD representatives inadvertently discovered records that purportedly had been destroyed in a flood, but the firm did not permit them to examine these records until several pages had been removed (Tr. 441, 656-665, 982). The firm also forged monthly bank statements that considerably overstated its financial condition (Tr. 1353-1358, 1371-1372, 1439, 2894). The hours during which SEC and NASD representatives were permitted to investigate were limited, the representatives were kept waiting more than half the time they were on the premises, and in several instances they were asked to leave. Requested records often were not provided, or were altered or rewritten before being provided (Tr. 460-462, 676, 1634-1637, 2659, 2841-2842, 4412-4414, 4426).

NASD and the SEC he would "find a bullet" (Tr. 4298-4302). On April 10, 1974, petitioner Netelkos and a co-defendant, Horvat, destroyed numerous records subject to subpoena. When NASD representatives sought access to the books, Netelkos assaulted them in an effort to thwart the investigation (Tr. 693-695, 4126). Petitioner Santoriello also attempted to impede the investigation by falsely telling NASD examiners that records had been destroyed in a flood (Tr. 441, 656-657). As of April 1974, only $350,000 in securities were available to Christian-Paine to satisfy customer obligations of approximately $2,000,000 (Tr. 225).

ARGUMENT

1. 15 U.S.C. 78h(c) makes it unlawful for a securities broker, in contravention of SEC regulations, to hypothecate any customer's securities—

> under circumstances (1) that will permit the commingling of his securities without his written consent with the securities of any other customer, (2) that will permit such securities to be commingled with the securities of any person other than a bona fide customer, or (3) that will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee, for a sum in excess of the aggregate indebtedness of such customers in respect of such securities.[4]

[4]The corresponding regulations (17 C.F.R. 240.8c-1 and 240.15c2-1a) prohibit hypothecation under circumstances:

> (1) That will permit the commingling of securities carried for the account of any such customer with securities carried for the account of any other customer, without first obtaining the written consent of each such customer to such hypothecation;
>
> (2) That will permit such securities to be commingled with securities carried for the account of any person other than a bona fide customer. * * * or
>
> (3) That will permit securities carried for the account of customers to be hypothecated or subjected to any lien or liens or claim or claims of the pledgee or pledgees, for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts. * * *

Counts 2 to 8 of the indictment charged petitioners with having hypothecated customer-owned securities without the written consent of the owners and in such a way as to commingle them with securities owned by other customers, non-customers, and Christian-Paine, in violation of Section 78h(c). Petitioners Gamarekian, Rega and Santoriello contend (Pet. 76-1134, pp. 51-62) that these counts failed to charge an offense because they did not allege the third form of hypothecation stated above, *viz.*, hypothecation "for a sum in excess of the aggregate indebtedness of such customers in respect of such securities."

It is immediately apparent from the disjunctive formulation of Section 78h(c), however, that it prohibits hypothecation of customer-owned securities carried out in any *one* of three different ways, and does not require proof of each set of circumstances enumerated. As the Second Circuit has stated in *United States* v. *Eucker*, 532 F. 2d 249, 257:

> The statutory reference in the indictment [to 15 U.S.C. 78h] obviously includes all three subsections of §78h(c). * * * Clearly the Government is not required to rely upon that statutory provision which the defendant chooses to select.

Here the indictment charged, and the proof at trial established, that petitioners hypothecated customer-owned securities without owner consent and in a manner that permitted their commingling with other customers' securities and with securities owned by Christian-Paine. This was sufficient to establish a violation of Section 78h (c), as charged.

2. Petitioners Netelkos, Gamarekian, and Rega were convicted under Counts 9 through 13 of the indictment of having fraudulently sold customer-owned securities without owner authorization and of having commingled the

proceeds with the firm's own assets. Petitioner Netelkos contends (Pet. 76-986, pp. 13-15) that this scheme did not violate Section 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. 78j(b), because it was not carried out "in connection with the purchase or sale of any security." This claim has no substance.

Rule 10b-5, 17 C.F.R. 240.10b-5, makes it unlawful for anyone:

> (a) To employ any device, scheme or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

As this Court stated in *Superintendent of Insurance of New York* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12, Section 10(b) "must be read flexibly, not technically and restrictively." The Section "bans the use of *any* deceptive device in the 'sale' of any security by 'any person'" (*id.* at 10, emphasis added), and in enacting the legislation "Congress made clear that 'disregard of trust relationships by those whom the law should regard as fiduciaries, are all a single seamless web' along with manipulation, investor's ignorance, and the like" (*id.* at 11-12, quoting H.R. Rep. No. 1382, 73d Cong., 2d Sess. 6 (1934)).

Here petitioners plainly "disregarded" their trust relationship to their customers. The evidence demonstrated that petitioners' purchase of securities for customers, their sale of those securities without customer consent, and their practice of shorting customers were interrelated aspects of a continuing scheme. Petitioners' failure to inform their customers of those obviously material practices when they purchased securities for their customers and subsequently sold them to others clearly constituted a scheme to defraud in connection with purchases and sales of securities in violation of Section 10(b).[5]

3. Petitioners Gamarekian, Rega and Santoriello contend (Pet. 76-1134, pp. 23-40) that the evidence showed the existence of multiple conspiracies rather than the single conspiracy alleged. It is well settled, however, that a single conspiracy exists if the participants "[a]ll by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end" or engaged in activities "directed to achieving a single unlawful end or result." *Blumenthal* v. *United States*, 332 U.S. 539, 558-559. And "the mere fact that conspirators individually or in groups perform different tasks to a common end [does not] split up a conspiracy into several different conspiracies." *Braverman* v. *United States*, 317 U.S. 49, 52-53.

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[5]Indeed, the unauthorized sales of customer securities was a necessary element of the fraudulent shorting scheme, since those sales were made to conceal the shorting practice.

Petitioner Netelkos' argument (Pet. 76-986, pp. 14-15) that the dismissal of the count relating to the Estate of Daniels required dismissal of the fraudulent sales counts is unfounded. Since petitioners sold the Daniels' stock at the *direction* of the estate executor but failed to remit the entire proceeds, their conduct on that occasion (though larcenous) was not intimately related to their deceptive scheme of "shorting," that is, failing to purchase paid-for stock or selling such stock without the owner's knowledge or consent.

Here, although petitioners individually performed different tasks, they engaged in a common scheme to hypothecate and sell customer-owned securities without authorization, and to conceal these practices, for the purposes of covering firm losses created by the deceptive practice of "shorting." Petitioners Netelkos, Rega, and Gamarekian were the central figures in this scheme. They ordered the sellouts of customer securities and supervised the falsification of the firm's books, including ledger accounts and bank statements (*e.g.*, Tr. 1641-1657, 1766-1767, 1809-1814). Petitioner Santoriello handled transfers of funds and securities, participated in several meetings at which the illegal activities were discussed, and was present when changes were made in the records (Tr. 1639, 1737, 1741, 1809). Moreover, in an effort to thwart an investigation of Christian-Paine, he falsely stated to NASD officials that records they were seeking had been destroyed in a flood. In short, petitioners were linked by a pact of "mutual dependence and assistance" (*United States* v. *Tramunti*, 513 F. 2d 1087, 1106 (C.A. 2), certiorari denied, 423 U.S. 832) in a single conspiracy designed to deceive both their customers and the regulatory bodies charged with supervision of the federal securities laws. See *United States* v. *Eucker*, *supra*, 532 F. 2d at 254-255.

4. In charging the jury with respect to conspiracy, the trial court stated (Tr. 6356):

> [I]f you find upon all the evidence that more than one conspiracy has been proven, that there were several separate and distinct conspiracies and certain persons were members of one conspiracy and others were members of another or other conspiracies, even though one or more persons may have been members of each conspiracy, it is your duty to acquit all the defendants of the conspiracy count of the indictment.

Although they did not object to this charge at trial,[6] petitioners Netelkos and Ysrael now assert (Pet. 76-986, pp. 15-16) that it was prejudicial because it made the guilt of the alleged conspirators a question of "all or nothing," citing *United States* v. *Kelly*, 349 F. 2d 720, 758 (C.A. 2), certiorari denied, 384 U.S. 947. In *Kelly*, the Second Circuit held that giving the "all or nothing" charge was prejudicial to a defendant, Shuck, whose participation in the overall conspiracy was supported only by "tenuous and unsubstantial" evidence (349 F. 2d at 756). At the same time, the court found that the charge had not prejudiced two co-defendants as to whom the jury was "unquestionably entitled to find" participation in a single conspiracy" (*id.* at 755-756).

Petitioners clearly come within the latter category. As we have shown, petitioners Netelkos, Gamarekian and Rega were central figures in the conspiracy. Thus, insofar as the court's instruction would have required their acquittal in the event the jury acquitted "lesser" defendants, their cause could only have been helped. See *United States* v. *Sperling*, 506 F. 2d 1323, 1341 (C.A. 2). Similarly, notwithstanding petitioner Ysrael's assertion (Pet. 76-986, p. 16), she was more than a "fringe" participant in the scheme to deceive customers of Christian-Paine. At petitioner Gamarekian's direction, she set up and helped maintain a duplicate record-keeping system designed to conceal from regulatory auditors and customers the true financial situation of Christian-Paine. Thus, she was an important figure in the conspiracy, and the danger that she might be unfairly

[6]The court gave the instruction at the request of Rega's counsel (Tr. 6435).

convicted on the strength of the jury's conclusion as to the proof against the other defendants was slight.[7]

The trial judge carefully instructed the jury to consider the evidence separately against each defendant on each count and told it that "in judging whether any individual became a member of [the conspiracy] you may look only to what that individual * * * has been proven to have done" (Tr. 6336, 6343, 6374). These instructions, together with the substantial evidence of each petitioner's involvement in the conspiracy, protected petitioners against prejudice from the complained-of instruction.

5. Petitioners' contention (Pet. 76-986,pp. 16-18) that the trial court failed to marshal the evidence in sufficient detail or to charge specifically enough as to the defendants' theory of the case is without substance. The court instructed the jury for more than three hours (Tr. 6464), setting forth in detail all the elements of the crimes charged and the standards by which the jury should determine guilt or innocence on each count. In those instances where petitioners requested more detail as to the defense theory of the case, the request was granted (Tr. 6432, 6446). Petitioners made no request for further analysis of the evidence, nor did they object to the court's statement that "the record in this case is so lengthy that no purpose would be served by me attempting to give you a complete analysis of the entire record or all of the testimony of these people"

[7]For similar reasons, petitioner Ysrael errs in contending (Pet. 76-986, p. 19) that the court should have granted her a severance. There was no "great disparity in the weight of the evidence" as between her and her co-defendants and therefore no danger that their guilt would improperly "rub off" on her. *United States* v. *Mardian*, 546 F. 2d 973, 977 (C.A. D.C.). It is, of course, settled that mere variation in the strength of proof as between multiple defendants does not make severance obligatory. *E.g.*, *United States* v. *Somers*, 496 F 2d 723, 730-731 (C.A. 3), certiorari denied, 419 U.S. 832.

(Tr. 6352). Accordingly, petitioners have waived any objection to the court's charge. Fed. R. Crim. P. 30; *United States* v. *Esquer*, 459 F. 2d 431 (C.A. 7), certiorari denied, 414 U.S. 1006.

In any event, the trial court had no duty to marshal or otherwise comment on the evidence presented at trial. *United States* v. *Bernstein*, 533 F. 2d 775, 798 (C.A. 2), certiorari denied, December 6, 1976, No. 75-1798. Such matters are committed to the sound discretion of the trial court. *Starr* v. *United States*, 153 U.S. 614; *Quercia* v. *United States*, 289 U.S. 466. The court's failure to marshal the evidence on its own motion, even in a lengthy trial, is not error.[8] *Lowther* v. *United States*, 455 F. 2d 657, 665 (C.A. 10), certiorari denied, 409 U.S. 857, 887.

6. Petitioners Gamarekian, Rega, and Santoriello contend (Pet. 76-1134, pp. 47-50) that a mistrial should have been declared after the trial court excused a juror upon discovering that she was related to a prosecution witness. The claim is without merit. Although the defense did not consent to the discharge of the juror, such consent is not necessary when reasonable cause exists for discharging a juror. *United States* v. *Ellenbogen*, 365 F. 2d 982, 989 (C.A. 2), certiorari denied, 386 U.S. 923; *United States* v. *Cameron*, 464 F. 2d 333, 335 (C.A. 3). The dismissal of a juror having a personal or familial relationship to a prosecution witness, to preserve the impartiality of the jury panel, is surely not unreasonable. Such matters are properly entrusted to the sound discretion of the trial court, see *Frazier* v. *United States*, 335 U.S. 497, 511-512, and in the circumstances of this case it cannot be said that the court abused its discretion.

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[8] As one court has noted, a detailed review of the evidence "carrie[s] risks of omission, over-enumeration, over-simplification of some facts compounded by over-complication of other facts." *United States* v. *Hyde*, 448 F. 2d 815, 842 (C.A. 5), certiorari denied, 404 U.S. 1058.

7. Petitioners Gamarekian, Santoriello, and Rega further contend that the trial court erred in refusing to order production of certain notes of the prosecutor and work papers of an accountant-witness (Pet. 76-1134, p. 46), in permitting a lay witness to testify as to the authenticity of handwriting, and in admitting testimony concerning Christian-Paine's violation of the "net capital rule" (15 U.S.C. 78h(b), 17 C.F.R. 240.15c 3-1 (Pet. 76-1134, pp. 43-45)). These claims are unfounded. The district court correctly ruled that the prosecutor's notes, consisting of proposed questions for a witness, and the accountant's work papers were not statements within the meaning of 18 U.S.C. 3500 (Tr. 1432). *Saunders* v. *United States*, 316 F. 2d 346, 350 (C.A. D.C.); see also *Goldberg* v. *United States*, 425 U.S. 94, 105-106. Nor was it improper for Gerhard Frank, an experienced official of the American Bank and Trust Company who was familiar with his employees' signatures, to testify (without objection) that the purported signatures of bank employees on bank reports in possession of Christian-Paine were not genuine (Tr. 1349, 1353, 1415). See Fed. R. Evid. 702. Finally, although petitioners argue (Pet. 76-1134, pp. 41-43) that they were unfairly surprised by the testimony regarding the net capital rule, the trial judge correctly noted that petitioners were in a position to determine before trial from the relevant books and records whether the government was likely to rely upon proof of violation of that rule (Tr. 427).

8. Petitioner Netelkos' contention (Pet. 76-986, pp. 20-23) that he was given separate sentences for the same offense is without merit. This Court stated in *Blockburger* v. *United States*, 284 U.S. 299, 304:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

In the present case Netelkos received consecutive sentences, totalling 11 years, for violations of five separate statutes,[9] namely, hypothecation of customer securities, unauthorized sales of customer securities, making and keeping of false records, filing false statements with the SEC, and filing a false Form X-17A-5 with the SEC. In addition, he received a five-year concurrent prison term for conspiracy. Each of these offenses required proof of different facts and was therefore separately punishable. Moreover, the sentence imposed for each was within the statutory limits (see *Dorszynski* v. *United States*, 418 U.S. 424, 431-432; *United States* v. *Tucker*, 404 U.S. 443, 446-447),[10] and the aggregate sentence of 11 years was fully commensurate with the gravity of petitioner's offenses in seeking to deceive customers of Christian-Paine.

9. There is no basis for the contention of petitioners Gamarekian, Rega and Santoriello (Pet. 76-1134, pp. 62-64) that Netelkos' examination of witnesses deprived them of their right of confrontation. This Court has recognized that an accused has a right to conduct his own defense, *Faretta* v. *California*, 422 U.S. 806, and petitioners did not object to Netelkos' exercise of that right until one month of the trial had been completed. As the district court correctly noted (Tr. 4790), the other petitioners should have made their objections when Netelkos first applied to dismiss his counsel and to conduct his own defense.

In any event, the district court repeatedly and forcefully instructed the jury that Netelkos' statements as an "attorney" were not evidence (Tr. 1419) and admonished

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[9]Within each category of offense he received concurrent sentences for his multiple convictions. See n. 1, *supra*.

[10]Petitioner does not contend that the district court relied upon inaccurate or improper information in sentencing him, but only that his convictions here rested upon the same "ultimate facts."

counsel to object to such statements when they were made (Tr. 1419-1423). Petitioners' objections to Netelkos' statements were almost always sustained (Tr. 4790). In those circumstances, Netelkos' occasional breaches of the rules of examination did not substantially prejudice petitioners and did not deprive them of their right to confrontation. Cf. *Dutton* v. *Evans*, 400 U.S. 74, 87.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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